INDEX.

AMENDMENT.

1. The court, in which a suit is pending, has the exclusive, discretionary power of permitting amendments in the process and pleadings, and no appeal lies from the exercise of such power. *Quiett* v. *Boon*, 9
2. A court has a right to amend the records of any preceding term, by inserting what had been omitted either by the act of the court or the clerk. *Galloway* v. *M'Keithen*, 12
3. A record, so amended, stands as if it had never been defective, or as if the entries had been made at the proper term. *Ibid.* 12
4. A court of record may amend its records at any time *nunc pro tunc*. *State* v. *King*, 203

APPEAL.

1. An appeal does not lie from an order of the County Court, appointing a guardian to a lunatic or idiot. *Willis* v. *Lewis*, 14
2. Upon an appeal to this court, the appeal bond covers the costs both of this court and the court below. *State* v. *Patterson*, 89
3. Where upon an appeal to this court by a defendant in an indictment, judgment was directed to be entered by the court below, both for the punishment and the costs, and the court below at September Term, 1842, entered judgment only for the punishment, they had a right at September, 1844, upon a rule previously obtained for that purpose, to enter a judgment *nunc pro tunc* for the costs also against the defendant and his surety, on his appeal to the Supreme Court. *Ibid.* 89
4. All of the plaintiffs, or all of the defendants, must join in an appeal from an inferior court, or the appeal will be dismissed.—*Wilkinson* v. *Gilchrist*, 228

See CONTEMPT, 3.

APPRENTICES.

See DAMAGES, 1.

ARBITRATION AND AWARD.

1. A submission to an award respecting the title to land, though made according to the recommendation of the testator, who devised it, must be by deed between the parties, and cannot be by parol. *Crissman* v. *Crissman*, 498
2. Where arbitrators undertake to decide according to law, and they mistake the law, the award is void; unless the whole question submitted was a dry question of law, and not involving any controversy of fact, in which

last case, it seems, the decision is conclusive, whether right or wrong in point of law. *Ibid.* 498

ASSUMPSIT.

1. Where a deputy sheriff received money on an execution in his hands, and failed to endorse it on the execution or give credit for it, but afterwards collected the whole amount, without deducting the sum so paid, and afterwards promised to pay the defendant in the execution, if such mistake had been made; *held* that an action will lay against the deputy upon such a promise, and that the party was not bound to sue the sheriff for a breach of his official duty.—*Tarkington* v. *Hassell*, 359
2. In such a case, the Statute of limitations only began to run from the time of the promise, not from the time of the money received, or from the time of the failure to pay it over. *Ibid.* 359
3. When upon a contract for work to be done, the party who is to do the work agrees to be answerable for lost time, the demand for this lost time is in the nature of unliquidated damages, and cannot be set off; but when the party afterwards acknowledges in a letter how much he owed for such lost time, *indebitatus assumpsit* may be brought for it. *Wheeler* v. *Dunn*, 380
4. A mother, who had money belonging to her children, advanced the money to the defendant, for the purpose of his purchasing negroes in North Carolina and delivering them to her in Georgia, where she resided—*Held*, that she could maintain this action for the money so advanced, in her own name, the defendant never having bought the negroes, and not having been advised that a part of the money belonged to her children. *Buchanan* v. *Parker*, 597
5. *Held*, secondly, that, though the plaintiff admitted he had received a part of the money by an attachment in Georgia, the defendant could not say the contract was merged in a judgment, unless he produced the record of the attachment in Georgia. *Ibid.* 597
6. *Held*, thirdly, that in such a case as this, the statute of limitations did not apply until after a demand by the plaintiffs on the defendant. *Ibid.* 597
7. If the act of 1815 will not bar, by the lapse three years, where the defendant is an agent, neither will the act of 1826, because there must be a cause of action subsisting, before the time under either statute can commence running. *Ibid.* 597

ATTACHMENTS.

1. An attachment before a justice of the peace, not made on its face returnable within thirty days from the issuing thereof, is *void*, by the express provisions of our act of Assembly concerning attachments. *Clark* v. *Quinn*, 175
2. So, attachments from a justice, like other original process, not made returnable on a certain day, are void. *Ibid.* 175

3. Under the attachment law, a judgment, taken against a defendant, who has not appeared, or some of whose property has not been attached, is utterly void. *Deaver* v. *Keith*, 374

4. Where a note payable in specific articles has been given by A. to B., then assigned to the defendant in the attachment, and afterwards by him transferred to C., who is summoned as a garnishee, this note is not the subject of attachment in the hands of C. and he is not bound on his garnishment to answer for its value. *Ibid.* 374

5. In no case, where the claim of the defendant against the garnishee, in a suit by attachment, rests in unliquidated damages, can the demand be attached.—*Ibid.* 374

6. A non-resident creditor cannot, under our attachment laws, attach the property of his debtor in this State, when the latter has not absconded nor removed to avoid the ordinary process of law. *Taylor* v. *Buckley*, 384

BAIL.

1. A sheriff is bail for two defendants. After judgment, a *ca. sa.* is issued and executed on one, who gives security for his appearance at court. The other defendant is not to be found. Before the day when the defendant, who was arrested, was bound to appear, he and the plaintiff entered into an agreement, that he would secure the plaintiff in some other debts he owed him, and in consideration thereof, the plaintiff would release him from the *ca. sa.* and would not at court oppose his discharge under the insolvent debtor's law. *Held*, that this did not operate as a release of the debt, nor did it discharge the sheriff from his liability as bail for the other defendant.—*Ferrall* v. *Brickell*, 67

2. When a joint judgment is obtained against three, and a *ca. sa.* issued against all, and the sheriff is directed by the plaintiff not to execute the *ca. sa.* on two, and he accordingly forbears to do so, the plaintiff cannot proceed against the bail of the third defendant, although as to him, the *ca. sa.* is returned *non est inventus*. *Trice* v. *Turrentine*, 236

3. A *ca. sa.* issued on a judgment against several persons, must be returned as to all, before the bail of any one can be subjected. *Waugh* v. *Hampton*, 241

4. Where a *ca. sa.* and a *fi. fa.* were both issued at the same time, and the latter was levied, and, while so levied, the sheriff returned the *ca. sa.* "not found," the bail cannot avail themselves of this in a plea to a *scire facias* to subject them. *Wheeler* v. *Bouchelle*, 584

5. It is only an irregularity, and the bail cannot by plea take advantage of an irregularity in the process against the principal, as if the *ca. sa.* had been sued out more than a year and a day after the judgment. *Ib.* 584

BAILMENT.

If a bailee misuses the thing bailed, an action on the case lies—if he refuses to deliver the property bailed, when properly demanded by the bailor, an action of trover is the remedy. But trespass *vi & armis de bonis asportatis*, will not lie, unless the property has been destroyed by the bailee. *Setzar* v. *Butler*, 212

BANK OF CAPE FEAR.

The Cape Fear Bank is subject to the payment of no public taxes, either State or County, except the payment of twenty-five cents on each share of the stock owned by individuals. *Bank of Cape Fear* v. *Edwards*, 516

BANKRUPTS.

1. The provision in the bankrupt law, which prevents a debtor from being discharged under the commission of bankruptcy when the debt is of a fiduciary character, extends only to special trusts, but does not extend to implied trusts, such as those of agents, factors, &c. *Williamson* v. *Dickens*, 259
2. When a creditor has a claim which he might enforce, either by an action of assumpsit or in *tort*, if he sues in *tort*, his action shall not be barred by a discharge under the bankrupt law. *Ibid.* 259
3. The creditor is not barred by this discharge, when, although he *might* have proved his claim under the commission, he was not *bound* to do so. *Ibid.* 259
4. In every such case, the *form* of the action brought is decisive of the question, whether the discharge is a good bar or not.—*Ibid.* 259

BASTARDY.

1. On the trial of an issue of bastardy, the examination of the woman being made by act of assembly *prima facie* evidence, the defendant can only introduce evidence to show that *he is not guilty*. He cannot attack the credibility of the woman. *State* v. *Patton*, 180
2. Nor can he even shew, on the trial, that she was an incompetent witness at the time of her examination before the magistrates, as that she was a colored woman, or had previously been convicted of some infamous offence, which disqualified her from taking an oath. *Ibid.* 180
3. If he wishes to avail himself of such defence, he must do so on a motion to quash the order of filiation, as being founded on incompetent evidence. *Ibid.* 180
4. If the woman, after her examination, becomes incompetent, this subsequent disability will have no other effect than to exclude her from being a witness before the jury. *Ibid.* 180
5. Where a woman has been examined on oath, under the Bastardy Act, before two justices, and one of them omits to sign the examination, the court, to which the proceedings are returned, may permit the justice *then* to sign the examination.—*State* v. *Thomas*, 366

BAWDY HOUSES.

1. A woman cannot be indicted for keeping a bawdy house, merely because she is unchaste, lives by herself, and habitually admits one or many to an illicit cohabitation with her. *State* v. *Evans*, 603

2. The offence of keeping a bawdy house consists in keeping a house or room, and therewith accommodating and entertaining lewd people to perpetrate acts of unchastity, meaning acts between the persons thus entertained. *Ibid.* 603

BILLS OF EXCHANGE, &c.

1. A. drew a bill, which was endorsed by B. at the request of the drawee and for his accommodation, and accepted by the drawee. A. being desirous of having the bill discounted at bank, requested C. to indorse the bill, as it then stood. *Held*, that, on the dishonor of the bill, and its payment by C., C. had a right to recover the amount from B. the prior endorser. *Hubbard* v. *Williamson*, 397

2. An accommodation bill was drawn for the purpose of being discounted at a bank, and at the foot of the bill was a memorandum, signed by the last endorser, directing the proceeds of the bill to be credited to the drawer. On the trial of a suit on the bill, by the last against a prior indorser, it appeared that this memorandum had been cut off. *Held*, that the memorandum was no part of the bill, and that its being taken off in no way affected the rights of the parties to the bill. *Ibid.* 397

3. Where a bank receives a bill of exchange from the drawer for collection, it acts as the agent of the drawer, and is entitled to no damages if the bill be protested; it can only claim expenses.—*Runyon* v. *Latham*, 551

4. Where a debtor by note to a bank paid the full amount of the note to the cashier, declaring that the payment was intended to discharge that debt, the cashier was bound to make the application accordingly, and could not apply any part of the sum so paid to the payment of damages on a protested bill, which he alleged to be due to the bank from the debtor. *Ibid.* 551

5. When the drawer of a bill dates a note at a particular place, as for instance "Danville," notice to him of the dishonor of the bill, directed to him at that place, may be sufficient. *Denny* v. *Palmer*, 610

6. But it is otherwise as to the indorser, who does not designate in his indorsement his place of residence, either generally or specially. *Ibid.* 610

7. The general rule is, that notice of the dishonor of a bill of exchange or promissory note indorsed, where the parties live in different places, must be sent by the next post, directed to the place of the party's residence; but, if the holders of the bill or note are exempted in law, by any particular circumstances, from the operation of this rule, such circumstances must be

shewn by the holder. *Ibid.* 610
8. Although, at the time of the indorsement of a note, the indorsers had reason to believe, and did believe, that the note would not be paid by the maker, this circumstance does not dispense with the necessity of a due notice. *Ibid.* 610
9. A drawer of a bill, who has no funds in the hands of the drawee, is liable without notice, on the ground of fraud. *Ibid.* 610
10. But if a bill be drawn for the accommodation of the acceptor, or a note indorsed for that of the maker, then the drawer of the bill or indorser of the note is entitled to notice, though the acceptor or maker be insolvent.—*Ibid.* 610
11. So, if a note is made for the accommodation of the payee, and he receives the money for it, he is not entitled to notice.—*Ibid.* 610
12. So, if a maker of a note places effects in the hands of the indorser to meet the note, the latter is not entitled to notice.—*Ibid.* 610
13. In every case, in which notice is dispensed with, there either must have been a fraud on the world in making the security, or it would be a fraud on the party, who, according to the form of the instrument, is legally bound, before him, who insists on notice, but where, in reality, and according to their actual liabilities, as between themselves, the relation of the parties is reversed, and he, who appeared to be primarily liable, was so only secondarily, and the other party was the real debtor. *Ibid.* 610
14. When the maker of a note has secured all his property for the indemnity of his indorser, it is not an implication of law from that circumstance, that the indorser has agreed to take up the note, and therefore dispensed with the legal notice. *Ibid.* 610
15. And this is more especially the case where the creditor is, by means of a trustee, a party to the deed of indemnity, and has a right to enforce it for the payment of his debt, and the indorser has not the absolute control over it for his own interest.—*Ibid.* 610
16. The acceptance by an indorser of an assignment to a third person, whether the maker be solvent or insolvent, or the assignment be partial or total, as an indemnity against existing or future indorsements of notes, given in renewal as the maker may require, in order to keep his paper from being dishonored, affords no presumption in law, that the indorser is under an obligation to take up the notes, when the maker shall fail to offer renewals and pay discounts: and such an obligation is the true test of the indorser's being entitled or not entitled to notice. *Ibid.* 610

BONDS.

1. Where A. by a penal bond stipulated that he would, by his last will and testament, devise a certain tract of land to C. S. in fee and in fact such will devised

the said land, as follows, to-wit, "I give and devise to my grandson C. S. agreeably to the bond which I executed, the land, (here describing it,) and in case C. S. shall die without leaving a child or children living at his death, then I give, &c. the said land to my grandson W. S. and his heirs and assigns forever,"—*Held* that this not being a devise of the land in absolute fee simple, the condition of the bond was broken, *Spruill* v. *Davenport*, 145

2. Secondly—that the proper measure of damages was the difference in value between an estate in absolute fee simple, and the defeasible fee here devised, tho' the damages could not exceed the penalty of the bond. *Ibid.* 145

3. The obliteration by the holder of a bond of a payment endorsed on it, does not destroy the validity of the bond. Such an entry is no more than a receipt, and constitutes no part of the bond. *Simms* v. *Paschall*, 276

4. Whatever weight the jury may give to the fact of such obliteration, in making up their verdict on the question of payment, there is no legal or technical presumption of payment, in such a case, of more than appears to have been in fact paid. *Ibid.* 276

5. When a bond is upon its face exclusively for the use of the State, an express acceptance by an agent for the State need not be shewn, *State* v. *Ingram*, 441

6. In an action on a bond payable to the State and conditioned for the building and keeping in repair of a public bridge, evidence that the bond was signed and sealed by the obligors, and was afterwards found among the official papers of the Clerk of the County Court, which appointed the commissioners to let out the building of the bridge, is sufficient proof of a delivery. *Ibid.* 441

7. A man, under a decree of a Court of Equity directing certain slaves in his hands to be sequestered unless he gave bond, entered into a bond conditioned that the slaves (naming them) should not be removed away, but that they should be forthcoming upon the further order of the court. Among the negroes named was one, who had been removed to Tennessee and sold three years before the bond was given or the decree made: *Held*, that the obligors in the bond were bound for the delivery of this negro as well as the others. *Hall* v. *Paschall*, 668

8. *Held*, further, that the condition of the bond was not broken, until the Court of Equity made the order for the forthcoming of the slaves, notice thereof was given to the obligors, and then a failure to produce them. *Ibid.* 668

See CONTRACTS, 14.

BRIDGES, PUBLIC.

See DAMAGES, 2.

BURNING A JAIL, &c.

1. In the statute to punish the burning of jails, &c. (Rev. Stat.

ch. 33, sec. 7,) the word "or" before "maliciously," should be construed "and," so that the burning must be both wilful and malicious, to constitute the offence provided against. *State* v. *Mitchell*, 350

2. If a prisoner burn a part of a jail, merely for the purpose of effecting his escape, and not with the intent to destroy the building, he is not guilty under the statute. *Ibid.* 350

3. But although his main intent may be to escape, yet if he also intends to burn down the building in order to effect his main design, he is guilty. *Ibid.* 350

4. If an intent to burn the building exists, the offence is completed, as in arson at common law, however small a part may be consumed. *Ibid.* 350

CERTIORARI.

See PRAC. AND PLEAD. 15, 16.

COLOR OF TITLE.

A paper, purporting to be a will of lands, which has but one subscribing witness, and which has never been proved as a will, is not such a color of title as will ripen a seven years' possession under it into a good title. *Callender* v. *Sherman*, 711

CONSTABLES.

1. The following entry of the appointment of a constable on the records of a County Court, to-wit: "It appearing to the satisfaction of the court, present Philip Baker, Esq. (and six others, naming them,) that Emsey Scott has been appointed constable in Capt. Phipps' company, the said Scott comes into court and enters into bond, &c. which is approved by the court," imports that Scott had been chosen by popular election, according to law, and that it was so decided by the County Court, and therefore the appointment was a valid one. *Welch* v. *Scott*, 72

2. A certificate from a Clerk of a County Court, simply stating that "A. B. came into court, and qualified as constable, &c., having been duly elected by the people, &c." without setting forth whether there were three or more justices on the bench on that or any preceding day, cannot be received as a transcript of the record of the court, because it does not appear that there were justices enough to constitute a court, and, therefore, having authority to make, or cause to be made, a record of the court. *State* v. *King*, 203

3. Where the words of the record of a County Court were: "The Court appointed J. G. E. constable, he having been elected in Capt. J's. company." *Held*, that this was evidence of an election by the people, and not of an appointment by the court. *State* v. *Eskridge*, 411

4. When in 1835, notes, the makers of which were proved to be solvent, were put in a constable's hands for collection, and on the trial of an action for the breach of his bond, which action was brought in 1840, he failed to account for or produce the notes: *Held* that the court did right in instructing the jury

that they might give in damages the whole amount of the notes. *Ibid.* 411

5. In an action by warrant against a constable's sureties under the Act, Rev. St. ch. 81, sec. 3, to recover moneys collected by a constable by virtue of his office, proof, that the constable had received goods or labor in satisfaction of the claim he had to collect, is sufficient to entitle the plaintiff to recover. It is not requisite that he should have received the actual money. *Wilson* v *Coffield*, 513

6. An action under that Statute can only be barred by the same length of time, that bars an action on the bond. *Ibid.* 513

CONSTITUTION.

1. The Act of Assembly passed in 1840, ch. 30, entitled "an act to prevent free persons of color from carrying fire arms," is not unconstitutional. *State* v. *Newsom*, 250

2. It is the settled construction of the constitution of the United States, that no limitations, contained in that instrument upon the powers of government, extend or embrace the different States, unless they are mentioned, or it is expressed to be so intended. *Ibid.* 250

3. Free people of color in this State are not to be considered as citizens, in the largest sense of the term, or, if they are, they occupy such a position in society, as justifies the legislature in adopting a course of policy in its acts peculiar to them—so that they do not violate those great principles of justice, which lie at the foundation of all laws.—*Ibid.* 250

CONTEMPT.

1. Where a court imposes fine or imprisonment for a contempt, if the order does not state the facts constituting the contempt, and the court is not bound to set them out, no other tribunal can reverse their decision. *Exparte, Summers*, 149

2. But if the court does state the facts, upon which it proceeds, a revising tribunal may, on a *habeas corpus*, discharge the party, if it appear plainly that the facts do not amount to a contempt. *Ibid.* 149

3. There can be no revision, either by appeal or *certiorari*, of the judgment of a court of record for imposing a punishment for a contempt of the court, declared by the record to have been committed in open court. *State* v. *Woodfin*, 199

4. The power to commit or fine for a contempt is essential to the existence of every court, and must necessarily be exercised in a summary manner. *Ibid.* 199

5. The punishment for a contempt, and a conviction on an indictment for the same act, when a crime, are *diverso intuitu*, and will stand together. *Ibid.* 199

See Process, 3.

CONTRACTS.

1. A. B. and C. agreed on the 11th of January, 1842, to indemnify D. and E. for advances made by

the latter to F. during the year 1842, each (including D. and E.) to be responsible for a sum not exceeding five hundred dollars each. On the 6th of January, 1843, the said parties, together with G., the defendant, covenanted "to continue their responsibility for F. for and during the year 1843, upon the same terms and for the same purposes as set forth in the foregoing covenant for the year 1842," with the same limitation as to the responsibility of the parties to five hundred. One of the parties proved to be insolvent. *Williamson* v. *Chiles*, 244

2. *Held* by the court, that the defendant G. was only responsible for advances made in the year 1843. *Ibid* 244

3. *Secondly*, that neither of the guarantors was responsible for more than five hundred dollars in either of the years—and that it was a several contract, so that none were responsible for the share to be contributed by one, who proved insolvent. *Ibid.* 244

4. When a contract is once made between parties, it binds and is legally presumed to subsist, until it be shewn to have been performed or rescinded. *Love* v. *Edmonston*, 354

5. Therefore, where A. covenanted with B. that he would pay him rent for a certain tract of land, provided B. continued a contract, respecting the said land, then subsisting between him and C., *held*, that before A. could discharge himself from the payment of this rent, he must shew that the contract between B. and C. had been rescinded.—*Ibid* 354

6. Where the defendant, by an agreement, in which, after reciting that the State had resolved to take two-fifths of the stock of the corporation, (which is the plaintiff in this suit) when three-fifths had been taken by private individuals, became bound among others to take certain shares of the stock, with this proviso, "Provided, however, that if a sufficient subscription is not obtained to secure the subscription of the State, within twelve months from the 1st of February 1837, each of us may, if we think proper, withdraw his subscription and be entitled to receive back whatever sum may have been advanced thereon within twelve months from the said date"—and where the defendant had paid a part of his subscription after the 1st day of February, 1838—*Held* that the defendant was bound to pay the remainder of his subscription, unless he could shew that the required amount had not been subscribed to entitle the Company to the State's subscription, and that, in consequence thereof, he had elected, within a reasonable time after the expiration of the twelve months, to withdraw his subscription. *Wil. & Raleigh Rail Road Co.* v. *Robeson*, 391

7. A *proviso* is the statement of someting extrinsic of the sub-

ject matter of the contract, which shall go in discharge of the contract, and, if it is a covenant, by way of defeasance.—*Ibid.* 391

8. A proviso, therefore, need not be stated in a declaration, but, if the defendant wishes to avail himself of it, must be averred in his plea. *Ibid.* 391

9. In this case the defendant, by paying a portion of his subscription after the expiration of the twelve months, has shewn that he had made his election to continue a member of the company. *Ibid.* 391

10. On a covenant by the defendant to pay the plaintiff $524, provided the title she acquired to her deceased husband's land by the sale of a sheriff under an execution against the heirs of her husband was good, in opposition to a sale made by the executor under a power in the will to sell for the benefit of volunteers, it was *held* that the plaintiff was entitled to recover, the creditors having a right to sell the land in preference to the right of the executor under the will. *Ingram v. Sloan*, 565

11. The rule, as to interest payable on debts, is regulated by the law of the country in which the contract is made, the law presuming that the contract is to be executed there, unless the parties stipulate otherwise. *Arrington v. Gee*, 590

12. And this stipulation, to take the case out of the general rule, must appear on the face of the contract. *Ibid.* 590

13. A contract, payable generally, naming no place of payment, is to be taken to be payable at the place of contracting the debt, and not where the domicil of the creditor may be. *Ibid.* 590

14. A bond, taken simply to secure the performance of a contract, wherever it may be executed, must bear the same interest as the original contract, unless it be otherwise expressed on the face of the bond. *Ibid.* 590

15. When A., a citizen of North Carolina, took a number of slaves to Alabama, and there sold them to B., a citizen of Alabama, who was to give him a bond with sureties for the price of the slaves, and this bond was executed by B. at Mobile, (Alabama) where it bore date, and afterwards brought to North Carolina and here executed by two sureties, citizens of North Carolina, the bond not expressing any place of payment: *Held*, that the sureties, as well as the principal, were bound for the payment of interest according to the laws of Alabama. *Ibid.* 590

COUNTY COURTS.

1. It must appear upon the records of every County Court, that at least three justices were present to hold the court—as a less number are not competent to constitute a court. *State v. King*, 203

2. If it appear that three justices opened the court, it will be intended that they continued to hold it, notwithstanding the adjournment, unless others be spe-

cially named as being present on subsequent days. *Ibid.* 203

COVENANT.

1. A. by deed under seal, "gave and granted unto B. to take effect at my (the grantor's death) the sum of five hundred dollars, to have, hold, and enjoy all and singular the said sum of five hundred dollars to the said B. his executors, &c., to the proper use and behoof of the said B., his executors, &c." And then warranted the said sum of $500 to take effect at his death to the said B., his executors—*Held*, first, that this is not a remainder in a personal chattel, after a reservation of a life estate, no particular chattel being designated. *Taylor* v. *Wilson*, 214
2. *Secondly*, That an action of covenant on this instrument against the administratrix of A. was well brought, though debt would also have lain. *Ibid.* 214
3. Debt and covenant are concurrent remedies for the recovery of any money demand, when there is an express or implied contract in any instrument under seal to pay it. *Ibid.* 214

DAMAGES.

1. In an action for enticing away an apprentice, the plaintiff is entitled to recover damages, as for a total loss of his services, if a total loss had in reality been the consequence of the acts of the defendant; if not, then the damages should be estimated according to the chances the plaintiff had of regaining his apprentice. *McKay* v. *Bryson*, 216
2. When a contractor for keeping a public bridge in repair commits a breach of his contract, and the County Court has caused the necessary repairs to be made, the rule of damages in an action for the breach is the value of the repairs needed, and not the sum the county might have paid for them. *State* v. *Ingram*, 441

See CONSTABLES, 4. ESCAPE.

DEBT.

See COVENANT, 3.

DEEDS.

1. A deed, under the statute of uses, can convey no title to land, unless a good or a valuable consideration is expressed on the face of it, or, if not so expressed, can be proved *aliunde*. *Springs* v. *Hanks*, 30
2. Conveyances by the common law, which operated by the actual transmutation of possession, required no consideration to support them; but those under the statute are void without consideration, because the statute only converts into a *legal* estate, the use, which was before an equitable interest; and equity would enforce no use, where there was not a good or a valuable consideration to support it. *Ibid.* 30
3. A signed and sealed a deed conveying certain slaves to B.—called upon witnesses to attest it, and acknowledged that it was his act and deed—the deed was left on the table and was not u-

gain seen until after A.'s death, about a month after this transaction, when it was found in A.'s trunk with his valuable papers: A. had previously said he intended to give this property to B., and just before his death said, "he was satisfied with the way he had disposed of the negroes, the deed of gift was in his trunk and he wished it delivered to B. immediately after his death."—*Held*, that these circumstances did not constitute a delivery of the deed, nor even afford any evidence tending to shew a delivery, which could be submitted to a jury. *Baldwin* v. *Manlisby*, 505

4. Where there has been no delivery in the lifetime of the grantor, a delivery after his death, though at his request, is void. *Ibid.* 505

5. Where a deed ran thus: "This indenture made (the date inserted) between J. W. and J. S. both, &c. witnesseth that I the said J. U. have this day bargained and sold a certain tract of land, lying, &c. (here the boundaries are described,) for and in consideration of the sum of $1,288 to me in hand paid by the said J. S., the right and title of the above described lands I will forever warrant and defend from me, my heirs and every of them, and every other person lawfully claiming, unto J. S. his heirs and assigns forever; to have and to hold with all its profits and advantages appertaining. Given under my hand and seal, &c." *Held*, that this deed, though informally drawn, was sufficient to convey the fee simple to J. S. *Armfield* v. *Walker*, 580

DESCENT.

1. Where one, who was seized in fee of lands, which she took by descent from her father, died before the passage of the act of 1808, (Rev. St. ch. 38, s. 1) intestate, leaving no issue, nor brothers nor sisters, but a mother and paternal uncles—*Held*, that the mother took no estate in this land, but that it descended immediately to the uncles. *Caldwell* v. *Black*, 463

2. *Held*, further, that upon the subsequent birth of half sisters of the *propositus*, the estate of the uncles was divested, and became vested in such half sisters, as the heirs of the *propositus*. *Ibid.* 463

3. *Held*, further, that, although a half brother was born subsequently to the passage of the act of 1808, yet, as his sisters were born before that period, and the estate of the uncles had thereby become divested, the last born son was equally entitled with his sisters to a share of the inheritance. If the estate of the uncles had not been divested by the birth of the sisters before the act of 1808, it would not have been divested by the birth of the son subsequent to the passage of that act, which altered the course of descent as regards the half blood. *Ibid.* 463

4. Although the statute of limitations in such a case, might have run so as to bar the first heir

who took, yet this shall not affect the preferable heir, who comes in subsequently, for the latter does not come in under the first heir, but above him, and defeats his estate, and therefore is not bound by his acts. *Ibid.* 463

DEVISES AND LEGACIES.

1. A., having nine children, in the year 1826 put into the possession of James Boswell, who had married one of his daughters, Nancy, certain slaves. In 1832, A. made his will and died. By his will, he gave to his wife certain real and personal property for life, and directed that after her death the personal property should be sold, and the proceeds equally divided among his children. He then disposes of his property as follows: "I give to my son Joseph, after his mother's death, the land given to her. I also now give him a negro man John, and his smithing tools, (and other property named) in order to make him equal with my other children. I give to the heirs of my son, Moses, deceased, one-ninth part of my estate not otherwise devised. I give to my daughter, Kitty, one-ninth part in like manner. I give to my son, Roger, the ninth part as above mentioned, after paying to the estate the sum of $60, that being a sum received over and above his equal part with my other children. I give to my son Heyden, the ninth part of my estate not otherwise devised, after paying to the estate the sum of $300, which has been received by him in property. I give to my daughter, Penelope Graves, the ninth part of the estate, as above stated, after paying the sum of $300 to the estate, it being for a negro which she now has in her possession. I will to my daughter, *Nancy*, the ninth part of the estate as above mentioned, except a tract of land I purchased from her husband, James Boswell, which land is to be sold and equally divided among my other children and their heirs. I give to my daughter, Priscilla, the ninth part of my estate as above named. I will to my son, Enoch, the ninth part of the estate, as above stated, with the addition of $200, to be received out of the estate, it being due to him in consequence of having received no land. I will to my son, Joseph, the ninth part of my estate, as before stated; making it equal to them all." The legacies were assented to, and the executors paid over to James Boswell one-ninth part of the estate, not deducting from it the negroes put in his possession in 1826—which Boswell held from 1832 till 1843, as his own property. *Simpson* v. *Boswell*, 49

2. *Held, first*, That the testator intended by his will, to ratify all the gifts, perfect or imperfect, which he had made to his children in his lifetime, and that therefore the negroes placed in possession of James Boswell on his marriage with the testator's

daughters were confirmed as gifts—though the gifts were not made strictly according to law. *Ibid.* 49

3. *Held, secondly,* That this possession of Boswell from the death of the testator, claiming the property in the negroes, barred the action of the testator's executors, by virtue of the Statute of Limitations. *Ibid.* 49

4. Where slaves are bequeathed by a testator to his widow for life, or during widowhood, and after her death or marriage to be divided among her and his children, the assent of the executor to the legacy vests a legal right in those in remainder, and an administrator *de bonis non,* cannot recover them. *Etheridge* v. *Bell,* 87

5. They are to be divided according to the provisions of our statute for those who hold slaves in common. *Ibid.* 87

6. A. by will executed in the year 1803, (in which year he died) devised land to his two daughters H. B. and S. B., to them and their heirs, "and if they should die without an heir, then to his wife B." The daughters died without issue. *Held* that the limitation over was too remote, the will having been made before our act of 1827. *Brantley* v. *Whitaker,* 225

7. A. bequeathed as follows: "I do *lend* to B's. four children C. D. E. & F. all my estate, real and personal," and then directs that the estate shall be kept together until C. arrives at 21 years, and then to be equally divided among the children, to them, their heirs and assigns forever.—*Held,* that the word *lend* did not tie up the estate to the time of the death of the children. *Cox* v. *Marks,* 361

8. A. bequeaths certain personal estate to four brothers and sisters, to them, their heirs and assigns, and then added: "If either of them should die without any *heir in marriage,* then their legacy to their own brothers and sisters." *Held* that the remainder over was too remote, and therefore void. *Ibid.* 361

9. A. having four children, devised, since the act of 1827, certain slaves to his daughter Nancy, then a married woman, and if she died without issue, one half to her husband, and the other half to her brothers and sisters. The executor assented to the legacy, and Nancy died without issue, leaving a brother and two sisters, one of whom was then a married woman, but her husband died soon afterwards.—*Held,* that the husband had a vested legal interest in one-third of the moiety of the said slaves, which passed on his death to his administrator. *Skinner* v. *Barrow,* 414

10. A devised as follows: "I will to my son M. W. A. all my estate, real and personal, for his use and benefit; and then to be divided off and distributed among his children, as he may think proper. That is to say, my land to be used by him, and the profits thereof to be to him; but the lands to be by him divi-

ded and distributed among his children as he may think proper. My negroes are to be used by him in any way he may think proper, and to be to his own use, for defraying their expenses for raising the younger ones, clothing, &c. but the said negroes and the increase thereof, to be by him divided among his children, as he may think proper. My notes and money (now about $30,000) to be by him kept on interest in good hands, and the interest accruing thereon to be to the use and benefit of the said M. W. A. and the amount of the said notes and money to be divided among his children, as he may deem proper. And I hereby appoint my son, M. W. A. the executor of this will." *Held*, that under this will, M. W. A. took but an estate for life in the lands, with the power of dividing it, either in his lifetime or at his death, among his children, and that, until such appointment, the remainder in fee either vested in the children or descended to the heirs of the testator. The widow of M. W. A. therefore, had no right to dower in the land. *Alexander* v. *Cunningham*, 430

11. Where there is an express estate for life to one, and a power to him to appoint the estate among certain persons, the first taker gets but an estate for life. *Ibid.* 430

12. Where the estate is not given expressly for life, but indefinitely to a devisee, with power to appoint, at his discretion or as he pleases, among certain named persons, or to a certain class, the better opinion in England is, that the devise should be construed to be a devise for life, with a power to appoint the inheritance unless the words of the will clearly negative such a construction. *Ibid.* 430

13. And the law is the same in this State, notwithstanding our act of 1784, Rev. St. ch. 122, s. 10, which declares that devises of land are to be construed in fee, unless, by the express words of the will or by plain intendment, it may be held to be of a less estate; for the only purpose of that provision was to establish a rule between the heir and the devisee in respect to the beneficial interest of the latter. *Ibid.* 430

14. A testator devised as follows: "I give to my wife a life estate in the land and plantation whereon I live," &c. After other provisions he proceeds: "To my son Aaron, I give a horse, &c., my land and plantation that I have before mentioned in this will, with all the farming utensils, &c. with all the implements of husbandry; and it is my will that he take care of his mother and smooth the pillow of her age." The will adds: "It is my desire, if there should be any misunderstanding about any parts of my will, that the persons concerned select two discreet and disinterested persons to decide it, and if they cannot agree, to choose a third person, whose decision shall be final."

Crissman v. Crissman, 498
16. *Held*, that the devise of the land to the son in the subsequent part of the will, must be construed as subject to the devise of the life estate to the wife in the first part, and not as revoking or controlling it. *Ibid.* 498

DIVORCE.

1. Where husband and wife are living in a voluntary state of separation, the court may in some cases grant a divorce *a mensa et thoro*, for the cause of adultery committed during such separation. *Wood* v. *Wood*, 674
2. But in no case will the court decree a divorce from the bonds of matrimony on the petition of a wife, who has separated herself from and lives apart from her husband on the ground of adultery committed since the separation—unless she alleges, and proves on the trial of issues under her petition, that she was compelled to such separation by the violent or outrageous conduct of her husband, in which case it shall be deemed that he separated himself from her.—*Ibid.* 674
3. If a wife petitions for a divorce from the bonds of matrimony, and alleges in her petition that she separated herself from her husband, she is estopped by this averment, and a verdict, that her husband separated himself from her, will not be regarded by the court, unless, upon a proper issue, circumstances of outrage or violence, justifying such separation, be found by a jury. *Ibid.* 674
4. In a proceeding for a divorce, the issues submitted and the verdict found should be as specific and certain, as the facts alleged in the petition. *Ibid.* 674

EJECTMENT.

1. When, upon a survey in an action of ejectment, the defendant admitted certain lines to be the lines of the plaintiff's land, and according to that boundary, the defendant was in possession of part of the plaintiff's land, without seven years' possession under color of title, the Court, upon the motion of the plaintiff's counsel, should have instructed the jury that the plaintiff was entitled to recover. *Smith* v. *Tomlinson*, 548
2. A person who was in apparent possession of a tract of land, when it was sold by the Sheriff under an execution against him, and in like possession, when an action of ejectment was brought against him, cannot, after entering a defence to the action, be permitted to allege that others, who were also in possession, had both the title and the sole possession. *Thomas* v. *Orrell*, 569
3. If the person thus sued meant to disavow any possession in himself, he should not have entered any defence. *Ibid.* 569
4. Upon a judgment by default against a casual ejector, if it be shewn to the Court that there are other persons in possession, holding different parcels in severalty, judgment will not be al-

lowed for the whole tract sued for, but only for the part, of which the person was in possession, on whom the declaration was served. *Ibid.* 569

5. Neither the tenant of land, nor any person claiming title by or through him, can dispute the right of the landlord to recover the premises in ejectment, after the expiration of the lease, upon the ground of a defect of title in the landlord. *Callender* v. *Sherman*, 711

See Color of Title. Mortgage, 2, 3. Notice to Quit, 1. Practice and Pleading, 9, 13.

ESCAPE.

1. Where, on a judgment recovered, the defendant is committed in execution to the Sheriff, either upon a *ca. sa.* or upon an order of commitment on his petition for the benefit of the insolvent debtors' law and his failure to entitle himself thereto, and the Sheriff *voluntarily* permits him to escape, the Sheriff is liable for the debt, even though he may afterwards retake his prisoner. *Lash* v. *Ziglar*, 702

2. The plaintiff in such a case affirm the prisoner in prison at his suit; but such affirmation will not be presumed; it requires some positive act. *Ibid.* 702

3. The plaintiff cannot, in his action against the Sheriff, for such voluntary escape, recover more than the amount of the debt, costs and interest, at the time of the escape. *Ibid.* 702

4. Where the plaintiff had two judgments against the defendant, and it appeared from the records that the defendant was ordered into custody only on one, the Sheriff is liable for the amount of that one alone. *Ibid.* 702

EVIDENCE.

1. The records of a court, upon matters within its jurisdiction, when offered in evidence, cannot be impugned by counter evidence. *Galloway* v. *McKeithen*, 12

2. On the petition of the guardian of a ward to the Court of Equity, two negroes were directed to be sold by the Clerk and Master for the purpose of re-imbursing him for certain necessary advances he had made for his ward. At the sale, the guardian bought the negroes and gave his notes. The ward came of age, and with the consent of the Clerk and Master, settled with his guardian and took back the negroes the guardian had bought. He then applied to the administrator of the Clerk and Master, to whom the bonds had been made payable for the bonds, and brought suit on them in the name of the administrator. *Held* that it was competent for the defendant to give these facts in in evidence to shew a payment and satisfaction of the bonds, to one authorized by the plaintiff to receive such payment. *Kinney* v. *Etheridge*, 34

3. The admissions or declarations of a sheriff's deputy are evidence against the sheriff, when they accompany the official acts

of the deputy or tend to charge him, he being the real party in the cause, for he is the agent of the sheriff. *State* v. *Allen*, 36

4. A vendor of a personal chattel is an incompetent witness to prove title in his vendee, because in every sale there is an implied warranty of title, if there be no contract to the contrary. But he becomes competent upon receiving from the vendee a release of his liability. *Freeman* v. *Lewis*, 91

5. It is not competent to examine a witness as to the meaning of a plain word in a contract, for that is a question of law determinable by the court. *Collins* v. *Benberry*, 118

6. The mere delivery by a clerk to a sheriff of a book, purporting to be a tax list, unauthenticated by the official certificate of the clerk, is not competent evidence that such was the tax list. *Kelly* v. *Craig*, 129

7. Where the clerk's office had been burnt, and the records destroyed, and it was proposed to establish the assessment of a particular lot for a certain year, and the sheriff was offered to prove that he had seen either in the clerk's office the original list, or in his predecessor's hands an authenticated copy of the tax list, and to show its contents, it not appearing that the latter was lost or destroyed, *Held* that the evidence was incompetent, and could not be left to the jury.— *Ibid.* 129

8. It is always a question of law, whether the best evidence in the party's power and of which the nature of the case admits, has been produced. *Ibid.* 129

9. The return or certificate of a ministerial officer, as to what he has done out of court, is only to be taken as *prima facie* true, and is not conclusive; it may be contradicted by any evidence and shewn to be false, antedated, &c. *Smith* v. *Low*, 197

10. On an indictment for passing a forged bank note, a witness is competent to prove that the note was counterfeit, who had for ten years been employed as cashier of a bank, who in that capacity had received and passed away a great number of the notes of this bank, without ever having had one returned as a counterfeit, and who swore that he believed he could readily distinguish between a genuine and a counterfeit note, not only from the handwriting of the signatures, but also from the paper, engraving and general appearance of the note. *State* v. *Harris*, 287

11. Where a paper writing is deficient in punctuation, and its sense may be varied as the punctuation is one way or another, extrinsic evidence may be introduced to explain its meaning.— *Graham* v. *Hamilton*, 428

12. On the trial of an issue it was incumbent on the defendant to shew that he had given to his father a valuable consideration for a slave, and he produced a bill of sale, the execution of which he proved by a subscribing witness, and which expressed a consideration of $300.—

The plaintiff's counsel asked the witness if he saw any money paid, and the witness replied that he did not, but that he saw a bond delivered by the defendant to his father, and being asked by the same counsel what bond, he replied "the defendant's bond to maintain his father and mother during their lives."—*Held*, that this examination on the part of the plaintiff did not dispense with the necessity of the defendant's producing the bond, or shewing that he had used the proper means to procure its production and then proving its contents. *Walters v. Walters*, 435

13. In the trial of an action for a slave, a party was permitted to prove by parol the contents of a bill of sale, under which he had claimed and held possession of the slave for more than thirty years, the bill of sale having been destroyed by the burning of the Register's office. *Gathings* v. *Williams*, 487

14. A purchaser of land at a Sheriff's sale is not bound to produce the original deeds, under which the person, whose land was sold, claimed title. Not being entitled to the custody of the originals, he is at liberty to read copies in evidence. *Irwin* v. *Cox*, 521.

15. Where the plaintiff offers to prove a contract by parol evidence, and it is objected that the contract was reduced to writing, the witness who is introduced to shew that there was a written contract must state the contents of the instrument to the Court, that the *Court* may judge whether it relates to the same contract offered to be proved by the plaintiff. It is error to leave this fact to be ascertained by the jury. *Ratliff* v. *Huntley*, 545

16. In an action of tresspass for beating the plaintiff's slave, evidence of abusive language by the defendant in relation to the plaintiff, who was not present, is admissible, to shew *quo animo* the act was done, and to enhance the damages. *Ibid.* 545

17. Where the plaintiff alleged, as a proof of the *bona fides* of her purchase, that she had given a valuable consideration for a slave, and introduced a witness to prove that she had conveyed to him a tract of land as the consideration for the purchase of the slave—*Held* that the deed for the land must be produced, as the best evidence, and, the deed being in existence, though in another State, parol evidence of its execution and contents could not be received. *Davidson* v. *Normont*, 555

18. Where upon the trial of a warrant before a justice for a bond of $10, he entered, as his judgment, "Warrant dismissed and judgment for the officer for one dollar," and it was proved on the trial of a subsequent suit for the same bond, that the merits of the case were examined by the justice, who tried the first warrant—*Held* that this would be a bar to the subsequent suit, unless the plaintiff could clearly shew that the justice only in-

tended to enter a nonsuit.—*Massey* v. *Lemon*, 557

See BASTARDY. JUSTICE'S EXECUTION, 3. WILLS.

EXECUTIONS.

1. An execution, under which an officer takes actual possession of the personal property levied on, has precedence over one previously levied on the same property, but under which no actual possession has been taken and retained by the officer levying it. *Barham* v. *Massey*, 192

2. Where a slave belonged to one for life, and to another in remainder, and an execution was against both, but the remainder man, prior to the lien of the execution, had conveyed his interest in the slave to a trustee to sell for the payment of debts, *held* that only the interest of the tenant for life was subject to the execution, the remainder-man having parted with his legal estate, and having no such certain resulting trust as was liable to execution. *Ibid.* 192

3. And although in the same deed of trust, a tract of land was conveyed for the same purposes, and the debts were all satisfied by the sale of this land, after the institution of an action for the slave founded on the levy, yet this did not enlarge the interest in the slave, which was obtained by the levy. *Ibid.* 192

4. The lessors of the plaintiff claimed under a sale by execution, tested in March, 1832, against one Lewis. The defendant shewed that Lewis had only an equitable title, and that by bond, bearing date in January, 1832, he had contracted to sell the same to the defendant—*Held*, first, that the title of Lewis having been equitable, the defendant could not therefore be estopped from insisting thereon. *Edney* v. *Wilson*, 283

5. *Held*, secondly, that Lewis by his bond had conveyed all his equitable interest to the defendant, before the teste of the plaintiff's execution, and therefore there was nothing on which that execution could be levied. *Ibid.* 283

6. Where A. conveyed negroes to B. in trust, "to be kept, hired out, or otherwise disposed of, for the maintenance and support of C."—*Held* that C. had no such equitable interest, as was the subject of execution under the act of 1812, (Rev. St. c. 45, s. 4.) *McGee* v. *Hussey*, 255

7. The principle, well established by our courts, is, that the legal estate is not to be transferred or divested out of the trustee by an execution, unless that may be done without affecting any rightful purpose, for which that estate was created or exists. Where the *cestui que trust* has not the unqualified right to call for the legal estate and to call for it immediately, as where the nature of the trust requires it to remain in the hands of the trustee, who, by the terms of the deed, is to do acts from time to time, the act of 1812 authorizing the sale of equitable interests does not apply. *Ibid.* 255

8. Where a sale of property under execution is made by a sheriff or constable, and the property brings more than the amount of the execution, it is the duty of such sheriff or constable to see that the excess is paid to the owner of the property. If he fail to do so, he is liable on his official bond. *State* v. *Reed*, 357

9. A return of a sheriff to a *fi. fa.* that "he had made a levy on personal property and taken a forth-coming bond, but had not sold it, that the obligors did not deliver the property on the day, and that, after the day, it was too late to make a sale," is not such a "due return" of the process as will exempt the sheriff from amercement. *Frost* v. *Rowland*, 385

10. The act, allowing the sheriff to take a forth-coming bond, operates only between the sheriff and the debtor and his sureties. The creditor is left to all his rights and remedies against both the debtor and the sheriff. *Ibid.* 385

11. Where land is rented for a share of the crop, an execution cannot be levied on the lessor's share, until it has been allotted to him by the lessee. *Gordon* v. *Armstrong*, 409

12. A *fieri facias*, although it creates a lien on property, which prevents the owner from selling it, unless subject to the lien, yet does not divest the property out of the debtor, until a seizure, and, even after the seizure, the sheriff gains but a special property, such as is necessary for the satisfaction of the debt, and leaves in the original owner the general property, which is an interest that he may convey and sell at law. *Alexander* v. *Springs*, 475

13. Therefore, where the plaintiff received a *bona fide* conveyance of property, which was subject to the lien of a *fi. fa.*, and the defendant, after the date of such conveyance, levied executions from a justice on the said property, and the same was sold by the sheriff and constable jointly, the plaintiff is entitled to recover from the defendant, who caused the property to be sold under the justice's execution, and received the amount of such sale, the excess beyond what was sufficient to satisfy the sheriff's execution. *Ibid.* 475

14. Whatever relation to the time of the sale a conveyance from the Sheriff may have for some purposes, it cannot be used to prove title, in an action brought before the deed was made. *Davis* v. *Evans*, 525

15. The act of 1812, Rev. Stat. ch. 45, sec. 4, was not intended to embrace any case, in which the trustee could not voluntarily convey to the debtor the legal estate, without incurring a breach of trust to other persons, with whose interests he is also charged. *Battle* v. *Petway*, 576

16. Where the court cannot decree a conveyance of the legal title at the suit of the *cestui que trust*, the trustee's estate cannot be divested by a sheriff's sale,

under an execution against the *cestui que trust*. *Ibid.* 576

17. If a *ca. sa.* and a *fi. fa.* are both issued, and, after the sheriff has levied the *fi. fa.* and, while he has the property undisposed of, he executes the *ca. sa.*, the court upon the application of the debtor will set aside the *ca. sa.* and discharge him from custody. *Wheeler* v. *Bouchelle*, 584

18. The return of a sheriff upon a *ca. sa.* "not found" is sufficient. *Ibid.* 584

19. If a sheriff sell, under an execution, property, which does not belong to the defendant in the execution, and the plaintiff in the execution, with a knowledge that the money was so wrongfully raised, receives it from the sheriff, he is guilty of the *tort*, equally with the sheriff. *Lentz* v. *Chambers*, 587

20. But where the real owner of the property is present at the sale and does not object, but acquiesces in it, he cannot support an action of *tort* against either the sheriff or the plaintiff in the execution, who receives the amount raised by the sale. *Ibid.* 587

EXECUTORS AND ADMINISTRATORS.

1. Where an executor offered a will for probate in the County Court—an issue of *devisavit vel non* there made up and tried, and an appeal to the Superior Court—*Held*, that in the Superior Court, the executor might by permission of the court renounce all right to the executorship and withdraw from the suit, one of the legatees in the will having intervened as a party, and agreeing to be responsible for all the costs. *Sawyer* v. *Dozier*, 97

2. *Held*, that the executor under those circumstances, became a competent witness in support of the will. *Ibid.* 97

3. The proceeding, in relation to the probate of a will, is a proceeding in *rem*, and every party in interest has a right to become a party in the cause at any time before the decision. *Ibid.* 97

4. An executor has an absolute right of refusal at any time before he undertakes the office, or intermeddles with the estate; and he does not definitely assume the office by propounding the will for probate. *Ibid.* 97

5. If, under any circumstances, the court of probate, in the particular case, has authority to grant letters testamentary or of administration, though they may be *voidable*, they are not absolutely *void*. If the court, in no possible state of things, could grant the letters, then they are void and convey no authority to any one to act under them. *Hymun* v. *Gaskins*, 267

6. If the grant is void, the defendant who is sued may plead *ne unques executor*—otherwise, if it be only voidable. *Ibid.* 267

7. A payment, made by a debtor to one who has obtained letters testamentary or letters of administration from a court of competent jurisdiction, is a good discharge to him, although the

grant be afterwards declared null and void. *Ibid.* 267

8. Where there were two co-executors, and one of them died, and afterwards the other died, the executor of the last may recover at law from the executor of the co-executor, who first died, a bond belonging to the estate of the first testator. *Lancaster* v. *McBryde*, 421

9. An infant of tender years cannot be an executor, *de son tort*, nor be sued as such. *Bailey* v. *Miller*, 445

10. It is not the paper title merely that makes one an executor of his own wrong, but it is the disposition, or the possession and occupation of the effects that do it. *Ibid.* 445

11. The refunding bond, which executors and administrators are authorized to take from legatees or distributees, are taken solely for the benefit of creditors.—*State* v. *McAleer*, 532

12. Therefore an executor or administrator, who has paid to a legatee or distributee more than he was entitled to, cannot for his own use recover the excess so paid, by an action on the refunding bond given by such legatee or distributee. *Ibid.* 532

See DEVISES, 4. FRAUDS, 4. 5.

FISHERIES.

1. All waters, which are actually navigable for sea vessels, are to be considered navigable waters under the laws of this State.—*Collins* v. *Benberry*, 118

2. No one can be entitled to a several fishery or the exclusive right of fishing in any navigable water, unless such right be derived from an express grant by the sovereign power, or, perhaps, by such a length and kind of possession, as will cause a presumption of such grant to arise. *Ibid.* 118

3. The mere circumstance of fishing the waters at any particular place, no matter for how long a time, raises no presumption of such a grant, because the person so fishing, exercises, *prima facie*, only a right, which belongs to him in common with all others. *Ibid.* 118

4. For the purpose of presuming a grant of an exclusive right in any person, it should appear that all others have been kept out by him and his grantors, not only from fishing with a seine, but from fishing in any manner in the waters to which he lays claim. *Ibid.* 118

FORCIBLE TRESPASS.

1. In an indictment for a forcible trespass for taking away goods, it is not absolutely requisite to use the words "against his will." It is sufficient to use words which necessarily convey the same meaning. *State* v. *Armfield*, 207

2. To constitute a forcible trespass, it is not necessary that actual force be used. Acts which *tend* to a breach of the peace may amount to it. *Ibid.* 207

3. Where three persons took away a slave from another, an old and feeble man, in his presence and against his will, and he was re-

strained from insisting on his rights by a conviction that it would be useless, and for want of physical power to enforce them, *Held* that this was a forcible trespass, for which the party was liable to indictment. *Ibid* 207

4. Where the prosecutrix was in in the peaceable possession, with her family, of a dwelling-house and its appurtenances, and four persons entered the yard of the house with hostile or unkind feelings and manners, against the will of the prosecutrix, to injure and insult her, and refused to go away when she bid them, and they had a common purpose in so doing, and abetted each other—*Held* that such acts and purposes rendered the parties liable to an indictment for a forcible trespass. *State* v. *Tolever*, 452

5. An indictment for forcible trespass will lie at common law, if the facts charged amount to more than a bare trespass. *Ibid.* 452

6. When the name of the county is mentioned in the margin of the indictment, and it is stated that the dwelling-house, on which the forcible trespass is alleged to have been committed, was "*there* situate and being," this must refer to the county mentioned in the margin. *Ibid.* 452

FRAUDS AND FRAUDULENT CONVEYANCES.

1. Where a daughter placed in the hands of her father $550, and also an order from her uncle for $122, which the father owed, for the purpose of enabling the father to purchase for her a negro woman at public sale—and the father purchased for her and in her name, and took a bill of sale in his own name, taking possession of the negro and giving his bond, according to the terms of the sale for the purchase money—but immediately afterwards conveyed the negro to his daughter, *held* that this conveyance could not be considered fraudulent against the father's creditors. *Buie* v. *Kelly*, 169

2. The father would at least have been compelled by a Court of Equity, under those circumstances, to make the conveyance to the daughter. *Ibid.* 169

3. But in fact, a conveyance from the father was unnecessary, as by the sale and delivery, the father purchasing for and in the name of his daughter, an absolute legal title immediately passed to the latter. *Ibid.* 169

4. Where a father made a fraudulent conveyance of slaves to his son, an infant of tender years, and then died, and the slaves were taken possession of by the grandfather of the infant, for the use and benefit of the infant—*Held*, that the grandfather was liable to be sued by a creditor of the deceased father as executor *de son tort*. *Bailey* v. *Miller*, 444

5. If a fraudulent donee of goods disposes of them to another, who accepts them *bona fide* upon a

purchase, or even to keep for the donee, the vendee or bailee would not be executor *de son tort*. But an infant of tender years can neither accept such a gift, nor constitute an agent to keep possession of it for him. *Ibid.* 444

8. The retaining of the possession of slaves by a vendor, after giving a bill of sale absolute on its face, though not *per se* fraudulent, yet is a circumstance, which with other facts and circumstances, found or admitted, would authorize the court to say, that the transaction was void for fraud. Fraud is a question of law, upon facts and circumstances, found or admitted. *Rea* v. *Alexander*, 644

7. Where it is a part of the agreement of sale, that, notwithstanding the absolute deed, the vendor shall have the possession and use of the property conveyed, for an indefinite period, this amounts to an express secret trust for the vendor, and constitutes a fraud on creditors deceived or hindered by the transaction.—*Ibid.* 644

See Mortgage, 1.

FREE PERSONS OF COLOR.

See Constitution.

GIFTS OF SLAVES.

Where a parent, since the act of 1806, places slaves in the possession of a child, and then dies intestate, in order to make it an advancement, a gift of the slaves at the time, and not a loan, must have been intended. *Cowan* v. *Tucker*, 78

HUSBAND AND WIFE.

Where a conveyance of land is made to husband and wife, they do not take interests, either as joint tenants or tenants in common, but they take estates in fee by entireties, and not by moieties. The husband cannot, by his own conveyance, divest the wife's estate, and, on her surviving him, she is entitled to the whole estate. *Needham* v. *Branson*, 426

See Divorce. Marriage.

INDICTMENT.

If an indictment sufficiently charge any offence, though not the one intended, it cannot be quashed. *State* v. *Evans*, 603

See Forcible Trespass, 1, 5, 6. Bawdy House. Malicious Mischief, 1, 2. Nuisance. Retailers, 4.

INFANTS.

See Ex'ors. & Adm'ors. 9.

INSOLVENT DEBTORS.

1. Where a person is arrested on a *ca. sa.* and an issue of fraud is made up between him and his creditor in the County Court, the issue is found against the debtor and he appeals to the Superior Court, the sureties to the appeal are bound absolutely for whatever judgment may be rendered against their principal in the Superior Court. *Williams* v. *Floyd*, 649

2. Such sureties have no right to

surrender their principal to the sheriff in discharge of themselves. *Ibid.* 649

3. Under the insolvent debtor's law of 1822, Rev. Stat. ch. 58, s. 10, the discharge of a debtor, arrested on a *ca. sa.* at the instance of a creditor, operated only against those creditors, who had been duly notified under the provisions of that act, *Ibid.* 649

4. Where a debtor is arrested under different *ca. sa's.* at the instance of several creditors, he has a right under the act of 1836, Rev. Stat. ch. 58, sec. 20, if he applies for his discharge as an insolvent debtor, and fraud is suggested in answer to his application, to require that all the creditors he may notify shall join in trial of *one* issue and the court will so direct. *Ibid.* 649

5. But this is for the ease of the debtor, and he may waive the privilege by joining issue with each creditor, and then a verdict in his favor in one case will not discharge him from responsibility in the case of another creditor. *Ibid.* 649

INTEREST.

See CONTRACTS, 11, 14, 15.

JURISDICTION.

1. In an action of assumpsit for goods sold and delivered, brought in the County Court, the damages were laid at $200. The evidence in support of the action was on the following instrument: "April 22d, 1840. Received 1500 (hundred) weight of bacon at 6 cents, and 128 lbs. of lard. (Signed) Wm. Tabor." On the back was endorsed, "Credit $36, paid April 22d." The jury found a verdict for $76 20 cents. *Held*, that this instrument was neither a promissory note nor a liquidated account, and therefore the case did not come within the provisions of the act of 1826, (Rev. Stat. ch. 31, s. 40,) prohibiting the courts from taking jurisdiction of any sum less than $100 due by bond, note or liquidated account. *Newman* v. *Tabor*, 231

2. *Held*, also, that if this were not so, yet the court could not dismiss the suit on motion, as the action was "commenced" for more than $100; the defendant's objection should have been urged by a plea in abatement. *Ibid.* 231

See JUSTICES, 4.

JURY.

1. In the trial of a capital case, the original *venire* ought to be first drawn and tendered; but if the judge should, where there are only eleven of the original panel, direct *tales* jurors to be drawn with them, the prisoner has no right to a *venire de novo* on this account, if he has had an opportunity of accepting or rejecting all of the original *venire*. *State* v. *Lytle*, 58

2. Where one of the *venire*, upon being called, was challenged by the State and directed to retire till the panel was gone through with, and was not afterwards recalled, the prisoner making no motion to that effect and it being

known that the juror was a witness for the prisoner, *held* that this was no ground for a *venire de novo* on the part of the prisoner. *Ibid.* 58

3. A short absence of one of the jurors impannelled, for necessary purposes and without any imputation of improper motives, does not vitiate the verdict of the jury. *Ibid.* 58

4. Where, in a capital case, when one of the jury, on their coming into court and being polled, said "that when he first went out, he was not for finding the prisoner guilty, but that a majority of the jury was against him, and that he then agreed to the verdict of guilty, as delivered in by the foreman," and when, being again asked, what is your verdict now, he replied, "I find the prisoner guilty:" *Held*, that there was no objection in law to the verdict. *State* v. *Godwin.* 401

JUSTICES OF THE PEACE.

1. A seal is indispensably necessary to a warrant, issued by a magistrate to arrest a defendant on a criminal charge. *Welch* v. *Scott*, 72

2. It is the duty of a magistrate, before issuing a warrant on a criminal charge, except in cases *super visum*, to require evidence on oath, amounting to a direct charge, or creating a strong suspicion of guilt; and an innocent person, arrested on a warrant issued by a magistrate not on his own view, nor on any oath, would have an action against the magistrate. But the officer executing such warrant is justified, the subject matter being within the magistrate's jurisdiction, though it does not appear upon what evidence it was issued. *Ibid.* 72

3. Where a magistrate gives a judgment against a defendant for a sum beyond his jurisdiction, the defendant may have an action for any acts done under it, or he may resort to a writ of false judgment to have it set aside. If he chooses to appeal to the County Court, he can there take advantage of the objection only by plea in abatement, or, according to the established course of our courts, under the general issue. *Morgan* v. *Allen*, 156

4. A single magistrate has jurisdiction of debts, though above sixty dollars, founded upon a former justice's judgment. *Ibid.* 156

5. A warrant from a justice in a civil case need not on its face be returnable on a certain day or at a certain place, but only within thirty days. The day and place are to be notified by the constable, who serves the warrant. *Duffy* v. *Averitt*, 455

6. A warrant from a justice in a civil case requires no seal. *Ibid.* 455

7. A warrant from a justice, in a civil case, must name the proper parties, and state a cause of action within the justice's jurisdiction, both as to the nature and amount of the demand. *Ibid.* 455

8. The overseer of a road may recover in his own name the pen-

nlty for hands not working on the public road. He is not bound nor required to sue "for himself and the county," since the fine is to be applied by the overseer to the keeping up of the road. *Ibid.* 455

9. Judgment on a warrant by an overseer of a road for thirty dollars, for thirty hands not working on a public road, when the jury fined only twenty-eight dollars, will not be arrested. As there are no declarations on a warrant, the court will intend there were thirty counts for $1 each per hand, and then there may be judgment on the twenty-eight counts proved, and not on the other two. *Ibid.* 455

10. The warrant, for the penalty for not working on a road, need not shew on its face that the road was in the county in which the warrant issues. Warrants never have a venue. The objection, even if the case had been in a court of record, must have been taken advantage of by a plea in abatement. *Ibid.* 455

11. A warrant for a penalty must set forth the acts, which give the penalty to the plaintiff, in order to shew "how the sum is due," and this is a matter of substance. But the plaintiff may amend by agreeing to claim no costs from the defendant. *Ibid.* 455

See EVIDENCE, 18.

JUSTICE'S EXECUTION.

1. Where the execution of a justice of the peace is on the same paper with the judgment, it must be considered as referring to the judgment, and is made certain as to the debt, interest and costs, and the person who recovered the same. *McLean* v. *Paul*, 22

2. Where the levy of a justice's execution was "on 450 acres of land, adjoining the lands of A. B. and C. (mentioning their names,)" the court can see no objection to the levy on its face, and without further evidence cannot say that the land was not sufficiently identified, as our act of Assembly requires. *Ibid.* 22

3. It is not competent, on the trial of an action of ejectment, for a party, who claims under a levy made by virtue of a justice's execution, to prove by parol that due notice had been given of such levy by the constable, as required by act of Assembly. *Ibid.* 22

4. The awarding of the *venditioni exponas*, or order of sale by the County Court, imports, that notice has been duly given to the defendant, unless the contrary clearly appear. *Ibid.* 22

5. Especially is that the case, when the Court expressly declare that notice has been given. *Ibid.* 22

6. When an execution from a justice has been levied on personal property, and is afterwards stayed according to law, the levy is released and the owner may sell the property to whom he pleases. *Hamilton* v. *Henry*, 218

7. When an execution issued by a justice is returned to the County Court levied on land, no execution against the goods and chattels of the defendant can issue

from that court, unless on application of the plaintiff a judgment has been there previously rendered for the amount of the recovery before the justice. If such execution issues, it is void. *Ibid.* 218

8. An execution from a justice of the peace issued against a defendant in his lifetime. After his death, and before the return day of the execution, it was, for want of chattels, levied on his lands, the levy returned to the County Court, and, after due notice to the heirs, the court ordered the lands to be sold and that a *venditioni* issue for that purpose: *Held*, that the levy was good, the proceedings under it regular, and that, when the sale took place, it should have relation back to the levy, and the proceeds should be applied to that execution in preference to executions subsequently issued from a court of record on a judgment against the heirs upon a *sci. fa.* *Parish* v. *Turner*, 279

9. Where a party is dead at the time of the levy on lands under a justice's execution, notice to his heirs is as effectual, as if given to the party himself, when living. *Ibid.* 279

LAWS OF OTHER STATES.

1. What is the law of another State, (not contained in a statute) is, like the law of foreign countries, a matter of fact to be tried by the jury, and cannot be determined by the court. *Moore* v. *Gwynn*, 187

2. Where a case arises under a statute of a sister State, the statute being properly authenticated under the act of Congress, or proved under our act of Assembly, it is the province of the court to decide both upon the existence of the statute and its proper construction *Ibid.* 187

3. So, where the plea of *nul tiel record* is pleaded to a judgment or other proceeding in a court of record in another State, from necessity the court, to whom it is exhibited, decides not only upon the legal existence of the supposed record, but upon its effect. *Ibid.* 187

LIMITATIONS, STATUTE OF

1. An act or acknowledgment of one partner, after the dissolution of the partnership, which prevents the operation of the statute of limitations as to that partner, will also prevent its operation as to the other partners. *Walton* v. *Robinson*, 341

2. Making a payment on a note repels the statute. It is assuming the balance anew. *Ibid.* 341

3. A person suing in ejectment, who was under a disability, which prevented the statute from running against him, is entitled to recover his share, although there are tenants in common with him, whose right of action is barred by the statute. *Caldwell* v. *Black*, 463

4. An action of ejectment by husband and wife is not barred by the statute of limitations, altho' the defendant may have been seven years in possession under color of title, the possession hav-

ing commenced during the disability of the wife. *Ibid.* 463

5. Where a husband sells land belonging to his wife, by a deed purporting to convey a fee simple, she not having joined in the conveyance so as to pass her title, and the bargainee takes and holds possession under such conveyance: *Held*, that neither she, nor her heirs if she died during the coverture, are barred from asserting her or their title by the statute of limitations, until after the lapse of seven years from the death of the husband, the possession of the alienees not being adverse until the death of the husband. *Fagan* v. *Walker*, 634

See ASSUMPSIT, 2, 6, 7. CONSTABLES, 6. DEVISES, 3.

LUNATIC.

See APPEAL, 1.

MALICIOUS MISCHIEF.

1. In an indictment for "unlawfully, wickedly and maliciously" cutting and destroying a quantity of standing Indian corn, cannot be supported. *State* v. *Holmes*, 364

2. An indictment for malicious mischief will only lie for the malicious destruction of personal property. *Ibid.* 364

3. Growing corn, except in a few cases, is regarded as a part of the realty. *Ibid.* 364

MALICIOUS PROSECUTION.

1. In an action on the case for a malicious prosecution, the want of probable cause for the prosecution, does not *necessarily* imply malice in the prosecutor, so as to authorize the judge to pronounce that this want of probable cause implied such malice. *Bell* v. *Pearcy*, 83

2. And, as the defendant in that action may prove that the plaintiff was actually guilty of the offence charged, so he may also prove matters shewing probable cause, though he did not know them at the time he instituted the prosecution. *Ibid.* 83

3. The right to recover in such an action, depends upon the entire innocence of the plaintiff, and malice in the defendant. *Ibid.* 83

MARRIAGE.

1. A marriage between a colored and a white person, contracted in 1832, was void, by force of the statute passed in 1830. Though this latter statute was repealed by the Revised Statute, passed in 1836, ch. 1, s. 2, repealing all previous statutes, yet that statute provided, that such repeal should not affect rights or actions, crimes or prosecutions, arising before the repeal. *State* v. *Hooper*, 487

2. Where a marriage is between persons, one of whom has no capacity to contract marriage at all, as where there is a want of age or understanding, or a prior marriage still subsisting, the marriage is void absolutely and from the beginning, and, as between the parties themselves and those claiming under them, no rights whatever are acquired by such marriage. *Gathings* v. *Williams*, 487

3. And whether a marriage was void or not, may be inquired into by any court, in which rights are asserted under it, although the parties to the marriage be dead. *Ibid.* 487

4. Where there are husband and wife domiciled in this State, and the husband obtains a divorce from the bonds of matrimony on a petition against his wife—if the wife afterwards goes into another State, the first husband being living, for the purpose of evading the laws of this State, and there marries another person, such marriage is null and void to all purposes. *Williams* v. *Oates*, 535

See PRACTICE AND PLEADING, 20.

MARRIAGE SETTLEMENTS

1. Marriage settlements must be proved, within six months after their execution, before a judge either of the Superior or Supreme Court, or before a court of record, or otherwise they will be void as to creditors. Probate before the Clerk of the County Court, as in the case of deeds in trust, will not be sufficient.—*Smith* v. *Castrix*, 518

2. An unauthorized registration is not even notice. *Ibid.* 518

MILLS.

1. None but a person, whose land is overflowed by a mill pond, can have the remedy to recover damages by petition, for the injury sustained by the erection of the mill, as provided by our statute concerning mills. Rev. St. c. 74, s. 9 & seq. *Waddy* v. *Johnson*, 333

2. When the land is so overflowed, the owner may recover *full* compensation for all the injury he has sustained thereby, whether it be more or less direct, whether it affect his dominion in the land by taking away its use, or impair the value of that dominion by rendering the land unfit or less fit for a place of residence, or whether the injury, reaching beyond its immediate mischief, extends also to the person, or the personal property of the petitioner. *Ibid.* 333

MORTGAGOR AND MORTGAGEE.

1. A delay of a mortgagee to enforce the payment of his debt is not fraudulent, so as to make his mortgage void, but the creditor may have his remedy in Equity, or promptly at law by a sale of the equity of redemption. *Davis* v. *Evans*, 525

2. A purchaser at a Sheriff's sale of an equity of redemption, may recover in an action of ejectment against the mortgagor who was in possession. *Ibid.* 525

3. The mortgagee, who is subsequently permitted to come in and defend the action can make no defence, which the original defendant could not make, and is, therefore, like him, estopped from denying the plaintiff's right to recover. *Ibid.* 525

4. The act of 1812, (Rev. Stat. ch. 45, sec. 5,) makes the equity of redemption, when sold under execution, a legal interest, to the extent, at least, of enforcing it by a recovery from the mortgagor himself. *Ibid.* 525

5. The act of 1812, (Rev. St. ch. 45, sec. 5,) includes, not only express mortgages, but also those that were intended to be securities in the nature of mortgages, and so held to be by construction of a Court of Equity. *Ibid.* 525

See SHERIFF, 6. VENDOR AND VENDEE, 4.

NOTICE TO QUIT.

1. Six months notice to quit must be given to a tenant from year to year, before an action of ejectment can be commenced against him. *Irwin v. Cox,* 521
2. Where a person, who had a lease until a day certain, having had notice to quit, held over, and an action of ejectment had been brought against him by the lessor, and pending this action he quitted the possession, and then the lessor sued him and recovered a certain sum for his use and occupation of the premises, during the time he held over—*Held* that this was not a waiver of the notice, nor evidence of a new tenancy from year to year. *Stedman v. McIntosh,* 571
3. If the money recovered in the last action had been recovered or received as *rent,* it would have been evidence of a new tenancy. *Ibid.* 571

NUISANCE.

1. It is only when the act or acts done by a person, or the omission to act by one, who ought to act, operate to the annoyance, detriment or disturbance of the public at large, that the offender is liable to indictment at the common law. *State v. Deberry,* 371
2. A single act of drunkenness, though it be in the presence of a crowd, is not indictable, if the persons assembled were not thereby annoyed or disturbed. *Ibid.* 371

PARTNER.

See STATUTE OF LIMITATIONS.

PATENTS.

A *scire facias* to repeal a patent, should set out particularly the patent of the plaintiff, or his title derived from a patent, with its boundaries and location; also a copy of the patent, with its boundaries, granted to the defendant or the person, under whom he claims, with all their correct names, and also how the two patents conflict; and the *scire facias* should also aver the reasons why the defendant's patent should be cancelled. If the defendant denies any of the plaintiff's allegations, issues upon those allegations and denials must be found by a jury. Otherwise, the court will not give judgment. *Holland v. Crow,* 448

PRACTICE AND PLEADING.

1. A plaintiff cannot be nonsuited, after a judgment by default against one of the defendants.—*State v. Pool,* 105
2. In sending a transcript of record in pursuance of a *certiorari* from one court to another, it is not necessary that the transcript should be affixed to the writ of *certiorari,* (though it is most proper it should be so,) provided

enough appears to shew the court into which it is certified, that it is in truth the proper transcript. *State* v. *Carroll*, 139

3. To a tender of an issue to the country by a prisoner in a plea of "not guilty," (in a capital case,) the Attorney General always replies the *similiter, ore tenus*; the record need not shew it. *Ibid.* 139

4. Where a prisoner prays a benefit of his clergy, a counter plea may be filed in the name of the prosecutor "for and in behalf of the State," if the same be adopted by the Attorney General, though it should properly be in the name of the Attorney General. *Ibid.* 139

5. If the prisoner contends that the offence, for which he now prays his clergy, was committed before his allowance of clergy for a former offence, he must avail himself of that defence by a plea of pardon when brought up for judgment, or by a special replication to the counter plea. *Ibid.* 139

6. A judgment of dismission is a proceeding unknown in Courts of Common Law Jurisdiction. *Morgan* v. *Allen*, 156

7. Where there are several plaintiffs in an action of *tort*, and after the pleadings are made up, one of the plaintiffs comes into court and enters a *retraxit*, the proper course for the court is to permit his name to be stricken from the writ and declaration, and suffer the other plaintiffs to proceed with the suit. In such a case, the court should not suffer the defendant to amend his pleadings by pleading in abatement the want of the proper plaintiffs. *Wilkinson* v. *Gilchrist*, 228

8. If one of the plaintiffs releases to the defendant, the defendant may plead this release in bar since the last continuance, and in England, the other plaintiffs may reply *per fraudem*, and have this issue tried at law. But in our State, the practice has been to leave the parties to their remedy in Equity. *Ibid.* 228

9. A plaintiff in ejectment may declare upon the same title against as many persons as are in possession of the land claimed, tho' their possessions may be several and distinct of different parcels of the land. *Love* v. *Wilbourne*, 344

10. The defendants in such a case may defend separately, each for the part in his own possession; or, if they defend jointly, each defendant may require that the jury shall find him separately guilty as to that part of the premises in his separate possession and not guilty as to the other parts, so as to confine the judgment, and also the action for *mesne* profits, against each defendant, to the parcel possessed by him. *Ibid.* 344

11. The court takes nothing for a declaration but a declaration; and takes no notice of any practice to the contrary, farther than that the knowledge of such an understanding between the parties or their attorneys, in a particular case, may induce the

court, in which the suit pended, to be very liberal in allowing the attorney of the successful party to make up the record, after the trial, in respect to the pleadings as well as the other matters, so as to effectuate the justice of the case, as it appeared to be on the trial. *Battle* v. *Howell*, 378

12. Where a motion is made in the court below, even in a capital case, to set aside a verdict upon the ground of improper conduct in the jurors, or other matters extrinsic of the record, and this motion is founded on affidavits, the Supreme Court will not look into the affidavits. They can only decide upon the record presented to them, and, therefore, if such motion is designed to be submitted to their revision, the facts must be ascertained by the court below and spread upon the record. *State* v. *Godwin*, 401

13. After a witness on a trial has been cross-examined, it is in the discretion of the presiding judge to permit or refuse a second cross-examination. Counsel cannot demand it as a right. *State* v. *Hoppiss*, 706

14. A declaration in ejectment may be against several defendants, holding different parcels of the same tract. *Needham* v. *Branson*, 426

15. An objection to the process, by which a defendant is brought into court, comes too late after he has appeared, and pleaded in bar of the action. *Duffy* v. *Averitt*, 455

16. The court below should not present to this court for its determination points, which did not arise from facts proved on the trial, but from alleged facts made the foundation of a motion for a new trial. *Caldwell* v. *Black*, 463

17. In the case of a petition for the condemnation of an acre of land for the site of a public mill, under our act of Assembly, (Rev. St. ch. 74, s. 2) where the County Court ordered a condemnation of the land, and refused an appeal from that order, to the party owning the land—*Held*, that the Superior Court was right in ordering a *certiorari* to bring up the proceedings before them. *Brooks* v. *Morgan*, 481

18. Although an appeal, which is in the nature of a new trial on the facts and merits, cannot be sustained, unless expressly given by statute, the Superior Court will always control inferior magistrates and tribunals, in matters for which a writ of error does not lie, by *certiorari* to bring up their judicial proceedings to be reviewed in the matter of law; for, in such case, the *certiorari* is in effect a writ of error, as all that can be discussed in the court above are the form and efficiency of the proceedings, as they appear upon the face of them. *Ibid.* 481

19. The record sent up to this court should not state the points of law arising on the trial, which were decided by the judge below against the party in whose favor is given the final judgment, from which the other party appeals. *Gathings* v *Williams*, 487

20. Where a part of the charge of the Court to the jury related to a matter totally immaterial, and benefitted neither the plaintiff nor the defendant, this is no ground for a new trial. *Ratliff* v. *Huntly*, 545

21. The County Court has a right to permit a sheriff to amend his return on an execution to that court by striking out a return of a levy and sale and returning *nulla bona*. If, upon an appeal from this decision, the Superior Court undertakes, without its appearing on their records that they had examined into the merits of the case, to reverse this order, it must be presumed to be done upon the ground that the County Court had no legal authority to make such an amendment; and, therefore, the Superior Court was in error, and *their* decision must be reversed, and that of the County Court affirmed. *Dickinson* v. *Lippitt*, 560

22. A declaration against a Minister of the Gospel or Justice of the Peace, under the Statute of 1778 (Rev. St. ch. 71, s. 1, 2, 3, 4,) for a penalty in marrying two persons, who had not complied with that Statute, must state, not only that they were married without license, but also that no certificate of the publication of bans was produced to the Minister or Justice. A mere averment that there was no license and that there had been no publication of bans is not sufficient to support the declaration. *Drake* v. *McMinn*, 639

23. Where a Court, in the exercise of its discretion, directs that an order, previously made by them, should be stricken out, it is the same as if such order had never existed. *Williams* v. *Floyd*, 649

24. Where a plaintiff, having two judgments against the same defendant, brought his action against the Sheriff for an escape and declared on both the judgments, *held* that though he could not recover on one, he might on the other, judgment. *Lash* v. *Ziglar*, 702

See CONTRACTS, 8. EJECTMENT, 2, 3, 4.

PRESUMPTIONS.

1. The uninterrupted possession of a slave for a long time, even before the act of 1820, Rev. St. 65, s. 18, affords a strong presumption of a good title in the possessor, unless reasonably rebutted by a fiduciary relation, an acknowledged bailment, disability of the one alleged to be the real owner, or the like. *Gathings* v. *Williams*, 487

2. The act of 1826, (Rev. St. ch. 65, sec. 13,) making the lapse of ten years a presumption of payment, applies to simple contracts as well as to sealed instruments. *Sprnill* v. *Davenport*, 663

3. But this legal presumption arises only on the expiration of ten years from the time the cause of action accrued. Therefore, when the action was upon a receipt of the defendants' testator, who was a constable, for notes belonging to the plaintiff, to collect, and it did not appear by any actual proof, that any demand

had been made by the plaintiff, until fifteen years after the date of the receipt, but this demand was made within three years before the bringing of this action. *Held*, that the Judge below erred in instructing the jury, that though there was no demand before the one proved, and therefore the ordinary statute of limitations could not run, yet that after the lapse of ten years from the date of the receipt, the law presumed the claim settled, unless the contrary appeared. *Ibid.* 663

4. But the judge might very properly have left to the jury the great length of time, which had elapsed, as a circumstance from which they might have inferred, that either a settlement had been made, or at least that there had been a demand for a settlement so long ago as to let in the operation of the statute of limitations. *Ibid.* 663

5. No length of possession of lands will in *law* amount to a presumption of title, when the origin of the possession is shewn; but such possession, with its attendant circumstances, must be left to the jury as a matter of fact, from which they may or may not infer that a legal conveyance of title had been made to the person claiming under the possession. *Callender* v. *Sherman*, 711

6. At any rate, the original consistency of relation, between the possession and the opposite title, must have been clearly dissolved and turned into an adverse possession for many years before suit, in order to make it available as a ground of presumption of title. *Ibid.* 711

See Fisheries, 3, 4. Roads.

PROCESS.

1. A seal of a court is essential to the validity of a commission to take testimony, directed to persons out of the county, from the court at which it issues. *Freeman* v. *Lewis*, 91

2. Though the law says that the officer, who has arrested a person on a *ca. sa.* and taken bond for his appearance at court, shall return the process and bond *on or before* the second day of the term, yet the court may, if they think proper, order him to return them on the first day. *Espar* v. *Summers*, 149

3. The officer who refuses obedience to such an order, and sends a contemptuous message to the court, when by their direction he is informed of it, may be fined by the court for a contempt. *Ibid.* 149

RAIL ROAD COMPANIES.

1. When an act, incorporating a Rail Road Company, declares that after the assessment and payment of the damages for the land, to be used for the construction of the road, the company may enter upon the said land, &c., "and hold the said land to their own use and benefit for the purpose of preserving and keeping said rail road during the continuance of their corporate existence" (sixty years;) "and

in all thing to have the same power and authority over said land so laid off, during their existence as a corporation under the laws of this State, as though they owned the fee simple therein"; *Held*, that, by this clause, the corporation, after assessment and payment of damages, became the tenant of the land, as the owner of the legal estate for the term of sixty years, subject to the earlier determination of the corporation from any cause.—*State* v. *Rives*, 297

2. *Held* further, that the provision in this section, that the said company "shall hold the said land for the purpose of preserving and keeping up the road," does not make a condition, upon the performance of which their estate depends, but these words only assign the reason, why the law vests the estate in the corporation. *Ibid.* 297

3. From the nature of things, as for instance, from the absolute necessity of giving such a corporation a right to trespass Q. C. F. or ejectment, to protect its enjoyment of the road, it follows that an estate must be vested in the corporation, unless it be clear that the contrary was intended. *Ibid.* 297

4. And such interest in the land may be sold under an execution against the corporation, although the corporate franchise itself cannot be sold under an execution. *Ibid.* 297

5. The right of transporting persons or things over the land of another for toll is but an easement united with a franchise, and is not distinguishable from other franchises. *Ibid.* 297

6. A Rail Road corporation is not dissolved by the sale of its road. *Ibid.* 297

7. Only the real estate, which remains in a corporation at the moment of its dissolution, reverts to the original proprietors; what has been divested out of the corporation by its own act or the act of the law does not so revert. *Ibid.* 297

8. Land, therefore, which has been vested in a Raid Road Company for the use of the road, if sold by execution, belongs to the purchaser until the charter of the company would by the limitation of its charter have expired. *Ibid.* 297

9. A Rail Road is not in all respects a highway *publici juris*, but it is the subject of private property, and in that character is liable to be sold, unless the sale be forbidden by the legislature; not the franchise, but the land itself constituting the road. *Ibid.* 297

REPLEVIN.

Where an action of replevin is brought to recover possession of a slave, in which an estate for the life of another is claimed, and the tenant for life dies pending the action, the plaintiff is only entitled to recover the value of the life estate and damages for the detention. *Barham* v. *Massey*, 192

RETAILERS.

1. The justices of the County

Court are not bound to grant a license to retail spirituous liquors to every one, who proves himself of good moral character; nor have they, on the other hand, the arbitrary power to refuse, at their will, all applicants for license, who have the qualifications required by the statute. (Rev. Stat. ch. 82, sec. 7.) *Attorney General* v. *Justices of Guilford*, 315

2. They have the right to exercise only a sound, legal discretion, referring itself to the wants and convenience of the people, to the particular location in which the retailing is to be carried on, and to the number of retailers that may be required for the public accommodation. *Ibid.* 315

3. The justices having a discretion to a certain extent in granting licenses to retail, a mandamus will not lie to compel them to grant a license to any particular individual, though he may have been improperly refused a license. *Ibid.* 315

4. But, if magistrates, fully informed that they have discretion to regulate a branch of the public police, (as, in this case, in granting licenses to retailers,) perversely abuse their discretion by obstinately resolving not to exercise it at all, or by exercising it in a way purposely to defeat the legislative intention, or to oppress an individual; such an intentional, and, therefore, corrupt violation of duty and law, must be answered for on indictment. *Ibid.* 315

ROADS.

1. Where a road has been used by the public for twenty years, without obstruction or hindrance, a grant from the owners of the land, over which the road passes, may be presumed. *State* v. *Hunter*, 369

2. Where a person, who occupies a tract of land, over which a public road runs, keeps up a fence across the road, though he did not originally erect it, he is liable to an indictment for a nuisance. *Ibid.* 369

SEARCH WARRANT.

1. A magistrate has no right to issue a search warrant for runaway slaves, or such as have been seduced away. *State* v. *Mann*, 45

2. A search warrant can only issue for goods or chattels, which are distinctly alleged to have been stolen. *Ibid.* 45

3. Where on the face of such a warrant, it appears, that the magistrate had not jurisdiction, the officer, who attempts to execute it, is a trespasser. *Ibid.* 45

4. A magistrate ought to issue no such warrant, except on oath; but although it does not appear to have been issued on oath, the officer is justified in executing it, if the subject matter be within the magistrate's jurisdiction. *Ibid.* 45

SEDUCTION.

1. A father can maintain either an action on the case or an action of trespass for the seduction of his daughter, living with him

or being under his control.—*Briggs* v. *Evans*, 16
2. Nor, where pregnancy is a consequence of the seduction, is it necessary for the father to wait till the birth of the child, to entitle him to full damages. *Ibid.* 16
3. An actual contract for services between the father and his daughter, though she be of age, is not required to be proved. It is presumed from any the slightest services rendered by her in the family. *Ibid.* 16
4. The action rests upon the assumed relation of master and servant, and not upon that of father and child. *Ibid.* 16

SHERIFFS.

1. It is not necessary, in an action against a sheriff for the misconduct of one who acted as his deputy, to shew a written deputation. *State* v. *Allen*, 36
2. It is sufficient to shew that he acted generally as deputy, without going back to his appointment. *Ibid.* 36
3. There is no law, which requires the deputation of the sheriff to be in writing. *Ibid.* 36
4. When claims are put into the hands of an officer for collection, and he refuses or neglects to account for them, he is justly chargeable not only with the principal sums, but also with interest from the time the claims began to bear interest. *Ibid.* 36
5. The sheriff is subject to the payment of 12 per cent. interest on moneys collected and not properly accounted for, according to our Act of Assembly, though the default was that of his deputy. *Ibid.* 36
6. Where an equity of redemption is sold under an execution against the mortgagor, the purchaser is bound to pay the money secured by the mortgage in the same manner as the mortgagor was; and the surplus of the proceeds of such sale beyond the amount of the execution, belongs to the mortgagor, and those who represent him. *State* v. *Pool*, 105
7. And where the sheriff himself, who sold such interest, was the mortgagee or trustee, his sureties on his official bond, are liable for such surplus. *Ibid.* 105
8. A bond, given by a sheriff for the discharge of his official duties, though void, according to the previous decisions of this court, because those who accepted it, had, at the time, no legal authority to do so, yet will become valid *ab initio* from a subsequent act of the Legislature, declaring that such bonds should be considered as having been legally delivered. *Ibid.* 105
9. And this consequence will follow, although the act of Assembly (as our act of 1844) was passed, not only subsequently to the institution of the action, but also to the determination in the court below, and the appeal to this court. *Ibid.* 105

See ASSUMPSIT, 1. ESCAPE. EXECUTIONS, 9, 10, 11, 12, 13, 18.

SLANDER.

1. To charge a man with having

stolen bank notes in South Carolina, is not actionable in this State, unless it be shewn by proof, that, by the laws of South Carolina, such stealing is subject to an infamous punishment. *Wall* v. *Hoskins*, 177

2. No such presumption can be made by the court, as by the common law the stealing of bank notes was not indictable, nor was it indictable in this State until the passage of a statute in 1811. *Ibid.* 177

SLAVES.

1. An indictment charging that a certain negro slave did "hire her own time, contrary to the form of the statue, &c.," is defective and must be quashed, because it omits to charge one essential part of the offence, that is, that she was permitted by her master to go at large. *State* v. *Clarissa*, 221

2. Under the first clause of the 31st section of the 111th chapter of the Revised Statutes, prohibiting masters from hiring to slaves their own time, the master is not indictable—he is only subject to the penalty of forty dollars. Nor is the master indictable under the second clause of that section; the process is against the slave, not against the master. *Ibid.* 221

3. The act of 1794 was not repealed by that of 1831 on the subject of slaves going at large. They were intended to punish different offences, and they are both now retained in the Rev. Stat. ch. 111, s. 31, 32. *Ibid.* 221

4. To constitute the offence under the latter section, it is not necessary that the slave should have hired his time. It is sufficient if the master permits him to go at large as a freeman. *Ibid.* 221

5. Presentment and indictment are considered, in construing the 31st section, as the same. *Ibid.*

6. The owner of a slave, who is hired out, is not answerable to a physician for medicine or medical services, rendered the slave at the request of the hirer, and without the request or knowledge of the owner. *Haywood* v. *Long*, 438

7. What may be the rights or liabilities in such a case, as between the owner and the hirer, *quære? Ibid.* 438

8. The hirer of the slave, and not the general owner, is liable in an action for medicine and medical services rendered the slave, while the term of hiring continued, the services and medicine not being rendered at the request of the owner, but at the request of the hirer. *Jones* v. *Allen*, 473

9. A particular custom in a county, that the general owner shall pay these expenses, does not vary the law. *Ibid.* 473

TAXES.

1. It is essential to the validity of a sale for taxes, that the sheriff shall have returned to the County Court, at its term next preceding the sale, a list of the lands on which the taxes are unpaid, and which he purposes to sell, with the names of the owners, if known, &c. as required by

law. The statute is not merely directory, but a sale made without complying with its provisions is void. *Kelly* v. *Craig*, 129

2. It must appear on the record that a majority of the justices were present in the County Court when the poor tax was laid, otherwise the sureties in the sheriff's bond will not be bound for it. *Dudley* v. *Oliver*, 227

3. At a sale for taxes on land, made after the first day of October of the year in which the taxes are payable, the Sheriff has no authority to bid off the land in the name of the Governor. *Love* v. *Wilbourne*, 344

See BANK OF CAPE FEAR.

TRESPASS.

See BAILMENT.

TROVER.

See BAILMENT.

TRUSTEE.

1. A *cestui que trust* is not entitled to call for the legal estate, when, from the nature of the trust, his ownership is not immediate and absolute, and when it would defeat, or put it in his power to defeat or endanger, a legitimate ulterior limitation of the trust.—*Battle* v. *Petway*, 576

2. Where by will made since 1827, property is conveyed to A. in trust for the use of B. and that he will pay over to him, annually, the nett income or interest accruing therefrom; but if B. should die without lawful issue, then the property to be held for others—*Held*, that B. could not compel A. to convey to him the legal estate. *Ibid.* 576

TRUST ESTATE.

Where one has a deed of trust for personal property, other than slaves, to secure a debt, and he admits the debt has been paid, and permits the person, who made the deed, to keep the possession of the property and sets up no claim—*Held* that the title to this property is revested in the person who had conveyed in trust, without any formal reconveyance. *Alexander* v. *Springs*, 475

USURY.

Every attempt by a bank to put upon a borrower bank bills, not its own, and below *par* at that time and place, is usurious, unless the bank by its contract of loan, engage to make the notes good as cash. *Bank of the State* v. *Ford*, 692

VENDOR AND VENDEE.

1. A sale of chattel at the common law vested a title in the purchaser without a delivery. *State* v. *Fuller*, 27

2. So it was, as to the sale of a slave, as between the parties, under our acts of 1784 and 1792, Revised Code, c. 225, s. 7: and c. 363. They only affected the rights of creditors. *Ibid.* 27

3. Whether our acts of 1836, (Rev. Statutes, c. 37, s. 19,) embodying these acts and omitting the preambles, may alter their construction, quere? *Ibid.* 27

4. A mortgagee, for a valuable consideration, is to be considered a purchaser under our statute against fraudulent conveyances. *Freeman* v. *Lewis*, 91

5. When A. in consideration of $200 paid to him by B. delivered to B. certain slaves to be held in trust for the use of A's. wife, from whom he had separated, and A. afterwards became reconciled to his wife and brought an action at law to recover the slaves: *Held*, that A. could not maintain the action, because, by the payment of the consideration and the delivery of the slaves, the legal title had vested in B. *Huntly* v. *Ratliff*, 542

WIDOW.

1. Though it is otherwise in England, yet, by our Statute, any testamentary provision for a wife, in either real or personal property, excludes her from any other share of her husband's estate of either kind, unless she dissent from the will in the manner and within the period pointed out by the Statute, and thereby elect to take according to her legal rights, independent of the will. *Brown* v. *Brown*, 136

2. This case happened before the Act of 1835, ch. 10, but that act refers only to the case of personal estate, giving the widow the same share of a residue of personal estate, as if the husband had died intestate—but has no provision as to real estate. *Ibid.* 136

3. Where a widow files a petition for a year's provision, under the statute, and dies before any allotment is made, the administrator has no right to revive the petition, but it is abated. *Cox* v. *Brown*, 194

4. Nor have the children any right to claim any allotment of a year's provision. This right is only given to the widow, and expires by her death before a final decree for the allotment. *Ibid.* 194

Same points, *Kimball* v. *Deming*, 418

WILLS.

1. A devise of a power to an executor to sell land, or a devise of the land to him in trust to sell, does not give him such an interest in the land as disqualifies him from being an attesting witness to the will. *Tucker* v. *Tucker*, 161

2. The act of 1840, chap. 62, requiring wills of personal property to be executed with the same formalities as wills of real estate, is to be construed to mean that they shall be attested by two subscribing witnesses, no one of whom, at the time of attestation, is interested in the bequest of personal estate. It does not confine the interest of the witnesses to the devise of lands, as in the case of wills devising lands. *Ibid.* 161

3. Therefore, where the will disposes of both real and personal estate, so far as the attestation of the subscribing witnesses is concerned, it may be good as to the one species of property, and not as to the other. *Ibid.* 161

4. One, who is named executor in a will, is so far interested, by reason of the commissions to which he is by law entitled, as to render him an incompetent attesting witness, as regards the disposition of the personal property. *Ibid.* 161

5. Therefore, where a will was made, devising real, and bequeathing personal estate, and it was attested by two witnesses, one of whom was named executor; *It was held* that it was a good will as to the lands, but not good as to the personalty. *Ibid.* 161

6. A will of personal property must be executed according to the law of the country, where the domicil of the testator was at the time of his death. *Hyman* v. *Gaskins*, 267

7. It is, therefore, most proper that such a will should be first submitted to the forum of the domicil at the time of the death—but that course is not absolutely necessary. *Ibid.* 267

8. The court of probate in this State does not enquire into the validity of a will of personalty, proved in the State where the domicil was, but looks only to the probate, and thereupon grants letters of administration, or letters testamentary, as the case may be. Or, perhaps, the probate had, and letters granted in another State, duly authenticated according to the provisions of the constitution of the United States, may authorize the executor or administrator to sue in our courts. *Ibid.* 267

9. The county, in which there are *bona notabilia* of one who was domiciled abroad, is the proper county in which probate of the will is to be had or letters of administration granted. *Ibid.* 267

10. Where a testator had his domicil in Florida, at the time of his death, and had *bona notabilia* in the county of Edgecomb, in this State, a probate of the original will in the court of this county, and the grant of letters testamentary to the executor, are not void. *Ibid.* 267

11. When the probate of a will has been obtained in a sister State, and is authenticated as the laws of the United States direct, it is in such an authentic form as to supercede the necessity of a probate in the courts of this State, and such an authentication may be given in evidence to sustain a suit. *Lancaster* v. *McBryde*, 421

12. Where a will is offered for probate upon the ground, that it was found among the valuable papers of the intestate, being all in his hand-writing; it is proper in the judge to leave it to the jury to determine, whether, from all the circumstances, they believe the paper writing was deposited by the deceased among his valuable papers, with the intention that it should be his will. *Simms* v. *Simms*, 648